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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/651,676	08/29/2003	William G.F. Kelly	CHI-0869-CIP	9313

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EXAMINER

COLE, ELIZABETH M

ART UNIT	PAPER NUMBER
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1771

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/06/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/651,676

Applicant(s)

KELLY ET AL.

Examiner

Elizabeth M. Cole

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/29/06</u> . | 6) <input type="checkbox"/> Other: ____. |

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-5 are rejected under 35 U.S.C. 102(b) as being anticipated by Gregorian et al, U.S. Patent No. 3,860,469. Gregorian discloses a layer comprising a nonwoven or woven fabric backing layer. The nonwoven or woven fabric would have apertures because all such fabrics have apertures due to their structure and thus the layer would be fluid permeable. The layer has a plurality of projecting elements which extend from the layer. The extending elements correspond to the claimed macrofeatures. The laminate comprises a second layer which can be a film layer. The film layer can be abraded, (see figure 7 and col. 8, line 63 – col. 9, line 13), in order to form apertures or perforations in the layer. The layer thus would comprise apertures and be fluid permeable and in fluid contact with the other layer. The fact that the two layers comprise apertures which extend through the layers is also shown by the teaching of Gregorian that the laminate comprising the abraded film is breathable. The projecting elements are formed by raising fibers from the fabric layer, either by napping, flocking or looping. See col. 3, lines 59-66. The film layer is applied by embedding the projecting elements in the layer. Thus, the film layer is also integral with the projecting elements. The fibers are thus a part of each of the layers and are integral with them. Thus, either layer could be considered the first or second layer and since Gregorian

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teaches that one of the layers is an apertured film and one of the layers is a nonwoven fabric, the structure meets claims 8-9, 20,26-27. The first surface of the layer would therefore follow the contour of the fibrous layer or the film layer and would be coincident with the first plane at the macrofeatures. The apertures of the fabric layer or the film layer would be separated from the film or the fabric layer by macrofeatures and would have the claimed structure. The projecting fibers have a height of 0.015 inch to .035 inch which encompasses the values set forth in the claims. With regard to the limitations regarding the laminate being for use in an absorbent body, since the structure of the absorbent body is not set forth in the claims, the limitations are treated as statements of intended use. Since the structure of Gregorian is capable of performing the intended use, the structure of Gregorian anticipates those claims.

3. Claims 1-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Langdon et al, U.S. Patent No. 5,500,270. Langdon discloses a laminate material. The first and second layers of the laminate material can be independently nonwoven webs, film, microporous sheets, porous sheets, etc. The first and second sheet can be apertured. See col. 3, lines 3-22. A plurality of spacer elements which correspond to the claimed projecting macrofeatures are disposed between and attached to the first and second layers. The spacers can either be adhesively or thermally bonded to the layers or can be cast as part of the layers. See col. 7, lines 1-16. For purposes of this rejection, the spacers will be construed as being integral with either the first or second

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sheet. The surfaces of the spacer will be construed as being the surface of the sheet at regions where the spaces occur. The first surface of the second layer will be the surface which is facing the first layer 42, the second surface of the second layer will be the opposite surface. Looking at figures 3 and 4, it is seen that the first and second layers each comprise first and second surfaces. The laminate material 40 comprises a first fluid pervious sheet or layer 42 and a second fluid pervious sheet or layer 46. The first and second fluid pervious sheets are provided with apertures 43 and 47. The apertures 47 originate in the first surface of the second layer 46 and extend in the direction of the second surface and terminate in the second plane. Since the claims do not specify that the second surface and the second plane are different, the second plane and the second surface are construed as being the same. The second layer 46 has a plurality of macrofeatures which are referred as spacer 48 which project from the second layer towards the first layer. Since the projecting elements are integral with the second layer and can be formed by casting the film so as to form the projections, the first surface of the second layer will be coincident with the first plane at the macrofeatures. The first layer 42 is in contact with the second layer 46 through the disconnected macrofeatures or spacers. . . Langdon teaches that the laminate material can be used as a topsheet for an absorbent article comprising an absorbent core and a backsheet. The macrofeatures of Langdon are not apertured and have a generally planar top surface. With regard to whether the first or second layer has the projecting features, since Langdon shows a two layered laminate and since either or both layer can be nonwoven or formed film, Langdon meets these limitations.

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4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-14 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-4, 7-31, 35-45 of copending Application No. 10/366,051. Although the conflicting claims are not identical, they are not patentably distinct from each other because each discloses a two layered apertured structure having macrostructures which extend from one layer to the other layer, wherein both layers are fluid permeable.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

6. Applicant's arguments have been fully considered but are moot in view of the new grounds of rejection. Applicant's amendments/arguments have overcome all previous rejections.

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Sorimachi et al, U.S. Patent No. 5,508,080.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (571) 272-1475. The examiner may be reached between 6:30 AM and 6:00 PM Monday through Wednesday, and 6:30 AM and 2 PM on Thursday.

Mr. Terrel Morris, the examiner's supervisor, may be reached at (571) 272-1478.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

The fax number for all official faxes is (571) 273-8300.


Elizabeth M. Cole
Primary Examiner
Art Unit 1771

e.m.c